

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 1, 2010

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087

Re: Water Rate/Tariff Change Application of Wiedenfeld Water Works, Inc.,
Certificate of Convenience and Necessity No. 12052, in Kerr, Kendall, and
Medina Counties; Application No. 36172-R; SOAH Docket No. 582-09-3549;
TCEQ Docket No. 2009-0372-UCR

Dear Ms. Castañuela:

I have enclosed the Executive Director's Reply to Exceptions to the Proposal for
Decision. Please let me know if you have any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Stefanie Skogen".

Stefanie Skogen
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing list

**SOAH Docket No. 582-09-3549
TCEQ Docket No. 2009-0372-UCR**

WATER RATE/TARIFF CHANGE	§	BEFORE THE TEXAS
APPLICATION OF WIEDENFELD	§	
WATER WORKS, INC.,	§	
CERTIFICATE OF CONVENIENCE	§	COMMISSION ON
AND NECESSITY NO. 12052, IN	§	
KERR, KENDALL, AND MEDINA	§	
COUNTIES, TEXAS,	§	
APPLICATION NO. 36172-R	§	ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR'S REPLY TO EXCEPTIONS TO THE PROPOSAL
FOR DECISION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission), by and through a representative of the Commission's Environmental Law Division, files the following reply to exceptions to the Administrative Law Judge's (ALJ's) proposal for decision (PFD). In support of his exceptions, the ED shows the following:

I. INTRODUCTION

This reply responds to statements made by Wiedenfeld in its exceptions to the PFD. To facilitate the discussion, any headings used refer to specific headings found in Wiedenfeld's exceptions. Although the ED's recommendation as detailed in his closing argument and exceptions has not changed, the ED offers the following based on the evidentiary record in this case to respond to Wiedenfeld's arguments.

II. REPLY TO WIEDENFELD'S EXCEPTIONS

A. Amending the application

Wiedenfeld argued that its application should have been evaluated based on the amendments it made to the application in its prefiled testimony.¹ The ED believes that Wiedenfeld did not properly amend its application and argued the following in his

¹ Wiedenfeld's Exceptions to the PFD 2, 4 (Oct. 21, 2010).

closing argument in support of that position:

Under title 30, section 291.25(g) of the Texas Administrative Code, a rate application may be modified on a showing of good cause. In his prefiled testimony, R. Charles Wiedenfeld, owner and president of Wiedenfeld, stated that he was making multiple revisions to Wiedenfeld's application, including a change to the requested rates.² The problem with these revisions is that Wiedenfeld never sought a finding of good cause for them from either the ED before the case was referred to SOAH or from the ALJ after it was referred. Therefore, Wiedenfeld's application has not been officially revised, and the September 12, 2008, application is the version of the application at issue in this case.

While section 291.25(g) does not explicitly state that an applicant must apply to the ED or the ALJ to be able to amend its application, any other reading of the rule would render it ineffective. When an applicant amends its application after filing, it potentially deprives the other parties of an opportunity to audit the utility's records, seek discovery responses, and provide direct testimony regarding those changes. Furthermore, such unhindered changes result in the other parties never being sure exactly which application they need to seek information for, analyze, and respond to, forcing them to redo their analyses every time the applicant makes another change. Section 291.25(g) requires an applicant to make a showing of good cause to prevent the applicant from amending its application at will. The fact that the applicant must make a *showing*

² *E.g.*, Ex. WWW-2, at 28:11-18 (recategorize pressure tanks), 34:6-7 (amended invested capital), 45:20-46:5 (new requested rates).

implies that it must be shown to someone. If the ED or ALJ does not make this finding, then how would anyone know that the applicant has made a showing of good cause? The other parties would not know exactly which numbers are at issue in the case and would be deprived of the chance to seek additional information regarding those proposed changes or argue that the changes should not be permitted.

Even if the ALJ believes that Wiedenfeld could amend its application through its prefiled testimony, there is some confusion regarding what revisions Wiedenfeld was attempting to make. As Leila C. Guerrero-Gantioqui, TCEQ auditor and ED expert witness in this case, pointed out in her testimony, there are multiple discrepancies between the numbers found in Mr. Wiedenfeld's testimony and Schedule C of that testimony.³ Under this scenario, at the closing argument stage of this case, the other parties still would not know which numbers they need to analyze and discuss. Surely this is the type of situation section 291.25(g) attempts to avoid. Therefore, the ED continues to assert that the September 2008 application is the applicable application, and it is the one the ED used to analyze Wiedenfeld's proposed rate changes.⁴

The inconsistency between Mr. Wiedenfeld's testimony and the revised application pages attached to that testimony was not the only issue regarding the revised numbers themselves. As the ALJ pointed out in her PFD, Wiedenfeld did not provide any supporting documentation for its revisions.⁵ Wiedenfeld argues that supporting

³ Ex. ED-1, at 4:15-5:7.

⁴ ED's Closing Argument 7-8 (June 29, 2010).

⁵ PFD 6 (Oct. 1, 2010).

documentation should be requested during discovery,⁶ but Wiedenfeld did not make its application revisions until after the discovery period had ended.⁷ Wiedenfeld's view that it did not need to provide support for its revisions is also contrary to the TCEQ's continued position that the numbers in the rate application must be supported with sufficient supporting documentation, a position the ED discussed in his closing argument and exceptions to the PFD.⁸ Wiedenfeld failed to provide such documentation for its revisions, giving the Commission even more reason to reject those changes and base its analysis on the original application.

The fact that no party in this case objected to the testimony in question is irrelevant and does not negate the fact that Wiedenfeld did not follow the amendment procedure required by section 291.25(g). Even if the Commission still chose to consider the amendments, which amendments would it consider – the ones that Mr. Wiedenfeld stated in his testimony or the ones that were portrayed in Schedule C? Either way, the changes were not supported with sufficient supporting documentation. If such documentation had been provided during the audit and discovery phases of the case, staff would have incorporated that information into their calculations. As the ALJ stated, no supporting documentation was provided during the prefiled testimony or hearing phases.⁹ Therefore, the application as originally filed is the application up for consideration in this case.

B. Water Code section 13.145 consolidated tariff

According to Wiedenfeld, the ALJ was incorrect when she found that Wiedenfeld had not demonstrated that its systems are substantially similar in terms of cost of

⁶ Wiedenfeld's Exceptions to the PFD 3 (Oct. 21, 2010).

⁷ Order No. 1, at 3 (July 7, 2009) (written discovery period ended on November 6, 2009); Order No. 5, at 1 (Jan. 11, 2010) (Wiedenfeld's prefiled testimony was due on February 4, 2010).

⁸ ED's Closing Argument 10-12; ED's Exceptions to the PFD 2 (Oct. 21, 2010).

⁹ PFD 5.

service.¹⁰ Wiedenfeld provided little support for this contention. It repeatedly stated that the last Aqua Texas rate case should apply to this case but did not cite to any specific provisions from the Aqua Texas order to support its position let alone discuss exactly how the evidence it presented met the same requirements Aqua Texas had met.¹¹ Wiedenfeld dismissed the ALJ's and OPIC's comparison between Wiedenfeld and Double Diamond Utilities without providing any citations to the order for the last Double Diamond Utilities rate case.¹² The utility also attempted to shift the burden of proof for this issue to the other parties¹³ when it is Wiedenfeld alone that carries that burden.¹⁴

The bottom line is that the ALJ found the evidence that Wiedenfeld presented on this issue to be lacking, stating "WWW proffered little persuasive evidence on the issue."¹⁵ Wiedenfeld does not need yet another bite at the apple to try to prove its systems are substantially similar. It was allowed to supplement its testimony to provide information regarding its costs of service both prior to and at the hearing after failing to provide any evidence on the issue in its original prefiled testimony.¹⁶ It also had multiple opportunities to make its argument regarding substantial similarity in its closing argument, reply to closing arguments, and exceptions to the PFD. Furthermore, even if the Commission found that the systems are substantially similar in terms of cost of service, Wiedenfeld has failed to show that it needs a rate increase to recover its revenue requirement.¹⁷ Wiedenfeld simply has fallen short of meeting its burden of proof in this

¹⁰ Wiedenfeld's Exceptions to the PFD 4-7.

¹¹ *Id.* at 4-5, 7.

¹² *Id.* at 5-6 (Oct. 21, 2010).

¹³ *Id.* at 7 (Oct. 21, 2010).

¹⁴ 30 TEX. ADMIN. CODE § 291.12 (West 2010).

¹⁵ PFD 15 (Oct. 1, 2010).

¹⁶ Ex. WWW-2; Ex. WWW-5 Ex. 1; Transcript of Hearing 339:10-341:25 (May 6, 2010).

¹⁷ PFD 42-43.

case, and its application should be denied.

III. CONCLUSION

Wiedenfeld filed an application to amend its rates for twelve water systems. The ED analyzed that application based on the information provided by Wiedenfeld and the laws of the State of Texas. Based on his analysis, the ED found that Wiedenfeld had not shown that its systems were substantially similar in terms of cost of service and calculated rates that are below Wiedenfeld's current rates. Based on these findings, the ED recommended that Wiedenfeld's application be denied. Wiedenfeld did not show that its systems are substantially similar and did not provide sufficient supporting documentation for all the costs and expenses listed in its application. Therefore, the ED again requests that the Commission adopt the ALJ's proposed order with the ED's recommended changes presented in his exceptions to the PFD.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

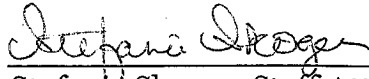
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CERTIFICATE OF SERVICE

I certify that on November 1, 2010, a copy of the foregoing document was sent by first class mail, agency mail, electronic mail, and/or facsimile to the persons on the attached mailing list.



Stefanie Skogen, Staff Attorney
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SOAH Docket No. 582-09-3549
TCEQ Docket No. 2009-0372-UCR

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